IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SIDNEY ZERNIT,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was expressed by the United States District Court for the Southern District of New York except such as was stated at the trial, which appears in the Record at folio 37 and is quoted in the petition. No opinion was expressed by the United States Circuit Court of Appeals for the Second Circuit, the judgment of the court below being affirmed in open court.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit now sought to be reviewed was entered on October 22, 1943. Jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, 28 U. S. C. Sec. 347(a).

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition.

Specification of Assigned Errors

It is intended by petitioner to urge all the assignments of error, six in number, filed in the lower court (R. 22-28). These assignments of error raise in substance the issue of the lower court's refusal to allow petitioner to show in defense to an indictment charging him with failure to report for induction that the induction order was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940.

ARGUMENT

The courts below erred in ruling that petitioner could not show in defense to an indictment charging him with failure to report for induction that the induction order was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940.

The trial court convicted the petitioner, after excluding his defense that the order he disobeyed was invalid, on the ground that the order was nevertheless final and not subject to review by the court, citing as authority for this

ruling *United States* v. *Kauten,* 133 Fed. 2d 703. The Circuit Court of Appeals affirmed the conviction, adhering to its earlier decision in the *Kauten* case. The question so decided, and presented here for review, has been considered in a number of other cases in the Circuit Courts of Appeal which are cited in the petition herein on page 7, and has been recognized by this court to be of such importance that writs of certiorari have twice been granted to review decisions of lower courts on that question.* But the question is as yet unsettled by this court, and unless the writ prayed for in this petition is granted will remain unsettled as to conscientious objectors refusing induction, although the case of *Falbo* v. *United States* (October Term, 1943, No. 73) now before this court will settle the question as to persons claiming exemption as ministers and refusing work of national importance.

Since the same basic issue is now before the court in the *Falbo* case, in which the undersigned has filed a brief *amicus curiae,* and since the issue has been extensively briefed for this court both as applied to the case of a conscientious objector (*Bowles* v. *United States,* 319 U. S. 33) and the case of a minister of religion (*Falbo* v. *United States, supra*), petitioner will not now burden the court with a repetition of arguments with which the court is already familiar from the briefs and arguments in those cases.

Petitioner merely desires to point out that while this court's decision in the *Falbo* case may settle in principle the issue here involved, anything which the court may say in that case as to conscientious objectors refusing induction will be only *dictum.* It is therefore important that the

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* *Bowles* v. *United States,* 318 U. S. 749;
Falbo v. *United States,* ..... U. S. ....; 87 L. Ed. 1362.

court decide the precise question raised here, as well as the question raised on the *Falbo* case, although both will turn on the same principle of law.

As to the merits of the point raised in this brief, petitioner begs permission to refer the court to the brief filed for the petitioner in *Bowles* v. *United States, supra,* and the briefs filed for petitioner and by the undersigned *amicus curiae* in *Falbo* v. *United States, supra,* which contain full argument of the point here made.

Conclusion

It is therefore respectfully submitted that this court grant the petition for certiorari so that it may settle the issue of law involved in this and many other similar cases and prevent injustice done to the petitioner.

Respectfully submitted,

JULIEN CORNELL,
Solicitor for Petitioner.

ERNEST ANGELL,
Of Counsel.

(19)

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No. 501

In the Supreme Court of the United States

OCTOBER TERM, 1942

SIDNEY ZENITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 501

SIDNEY ZERNIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Petitioner was charged in a one-count indictment filed in the District Court for the Southern District of New York with having unlawfully and knowingly failed to report for induction into the United States Army, contrary to the duty imposed upon him pursuant to the Selective Training and Service Act of 1940 and the rules and regulations issued thereunder (R. 3). At the trial before the district judge without a jury,[1] the Gov-

[1] Petitioner, by signed stipulation and in open court, upon examination by the judge, waived trial by jury (R. 10, 14–15).

ernment for its proof offered in evidence a stipulation of facts signed by both petitioner and his counsel (R. 11, 13–15). The stipulation showed that petitioner registered with Local Board No. 91 in New York City on October 16, 1940, and filled out and filed his Selective Service questionnaire on or about July 17, 1941 (R. 13–14). He was classified I–A (available for military service) by the local board on February 10, 1942. He appealed this classification, and on October 23, 1942, the board of appeal likewise classified him I–A by unanimous vote. On December 22, 1942, the local board mailed petitioner an order to report for induction into the Army on January 11, 1943. He failed to report on that date or at any time thereafter. (R. 14.)

For his defense petitioner claimed that the order to report for induction was void because "he was erroneously classified as available for military service, whereas under a proper construction of Section 5–g of the Act his exemption as a conscientious objector should have been granted" (R. 11–12).[2] In support of this claim he offered to prove that (R. 12)—

[2] The provisions of the Selective Training and Service Act of 1940 and of the regulations referred herein are copied in the Appendix to the Government's brief in *Falbo* v. *United States*, No. 73, present Term, at p. 79, *et seq.* Section 5 (g) of the Act provides for the exemption from combatant military training and service or from both combatant and noncombatant military service, as the case may be, of any person who "by reason of religious training and belief, is

* * * when he filed his selective service questionnaire he claimed to be conscientiously opposed to participation in all wars by reason of religious training and belief, including both combatant and non-combatant service; that he filed the proper statement of the nature of his views; his claim was denied by the local board and by the appeal board acting upon and adopting the recommendation of the Honorable Monroe Goldwater, who investigated his claim and held a hearing,[3] on the sole ground that although he is conceded to be conscientiously and sincerely opposed to military service, either combatant or non-combatant, he was not opposed thereto by reason of religious training and belief; and that in reaching this conclusion the draft board erroneously construed the term "re-

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conscientiously opposed to" such service. The power to hear and determine such claims for exemption is committed to the local boards (Secs. 5 (g) and 10 (a) (2)), and their decisions are final except where an appeal is authorized in accordance with regulations prescribed by the President (Sec. 10 (a) (2)).

[3] See pp. 40–41 of the Brief for the United States in *Falbo* v. *United States*, No. 73, now pending before this Court, for a description of the procedure on appeal by persons asserting conscientious objections. Under this procedure the appeal board transmits the registrant's file to the Department of Justice for an inquiry and hearing on the character and good faith of his conscientious objections. The Department then submits a report and recommendation to the appeal board, and although it is not bound by the recommendation, the board is required to give it consideration. (See Sec. 5 (g) of the Act and Reg. 627.25.) It is apparent from petitioner's offer of proof that this procedure was followed in his case.

ligious training and belief" as it appears in Section 5–g of the Act, as applied to one having the belief of the defendant.

Relying on the decision of the court below in *United States* v. *Kauten,* 133 F. (2d) 703, decided February 8, 1943, the Government objected to the admission of the proffered evidence on the ground that the Selective Service classification was not subject to review in the criminal proceeding and that petitioner's proper remedy was to submit to induction and then, if accepted, to seek review in habeas corpus (R. 12–13). The objection was sustained on that ground (R. 13). A motion by petitioner to dismiss the indictment which alleged that the order to report was unlawful and void was also denied (R. 13). The trial judge found petitioner guilty (R. 13) and sentenced him to imprisonment for three years (R. 4). On appeal, the judgment was affirmed in open court (R. 19).

DISCUSSION

Assuming that petitioner's offer of proof was specific enough under the circumstances of the case,[4] the question posed by the petition is whether

[4] The offer of proof did not specify the nature of petitioner's training and belief nor did it indicate in what respect the draft board misconstrued the statutory term "religious training and belief." However, the Government did not object to the offer on the ground that it was too vague and the trial court's refusal thereof was not predicated on that ground (*supra*).

a defendant is entitled to assert as a defense to an indictment for failure to report for induction that his I–A classification and the consequent order to report were based upon a misconstruction of the statute. That question was pretermitted in *Bowles* v. *United States,* 319 U. S. 33, at the last Term, but, as petitioner frankly concedes (Pet. 6), it is closely analogous to the issue now pending before the Court in *Falbo* v. *United States,* No. 73, argued on November 19, 1943. The latter case involves a registrant who claimed complete exemption as a minister and who sought to assert as a defense to an indictment charging failure to report for work of national importance that his classification as a conscientious objector (Class IV–E) was not based upon evidence, but was arbitrary and capricious. But these differences do not, in our opinion, distinguish the two cases. For in either case the Selective Service classification is final (Sec. 10 (a) (2)) and by the terms of the penal provision of the Act the registrant is bound to "perform any duty required by him under or in execution of this Act, or rules or regulations made pursuant to this Act" (Sec. 11). And the considerations which we urged in the *Falbo* case against permitting a registrant to defy an order to report and then challenge his classification in the consequent criminal prosecution on the ground that it is not supported by evidence apply as well in a case where, as here, the

registrant chooses to disobey such an order because he conceives it to be based upon a misconstruction of the statute.

We agree with petitioner, therefore, that the decision in the *Falbo* case will be controlling in principle on the question posed in the petition. Accordingly, we think it would be appropriate, assuming that petitioner's offer of proof was adequate, for the Court to withhold disposition of the petition for writ of certiorari in this case until it has decided the *Falbo* case.

Respectfully submitted.

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